NO. 21062

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERMA JEAN GOOD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
GERALD F. UELMEN,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

N O. 2 1 0 6 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERMA JEAN GOOD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
GERALD F. UELMEN,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 21062

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERMA JEAN GOOD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from a conviction on two counts charging violations of the federal narcotics and marijuana laws.

On March 2, 1966, indictment No. 35877-CD, returned by the February, 1966 Grand Jury, was filed in the United States District Court for the Southern District of California, Central Division, superseding indictment No. 35762, which had been filed on February 2, 1966 [C. T. 2]. 1/ It charged appellant, Erma Jean Good, with violations of the federal narcotics and marijuana laws

---

1/ "C. T." refers to Clerk's Transcript of Record.

in five counts. Count One charged that, in violation of Title 21, United States Code, Section 174, she conspired with one Darryl Ewite Kelley, beginning on or about June 1, 1965, and continuing to October 1, 1965, to fraudulently and knowingly receive, conceal, buy, sell and facilitate the transportation, concealment and sale of narcotic drugs, namely, heroin and cocaine, which had been imported into the United States contrary to law. Count Two charged appellant with aiding and abetting Darryl Ewite Kelley in the possession of heroin without registering and paying the special tax provided for by law in violation of Title 26, United States Code, Section 4724(c). Count Three repeated the charge in Count Two, but referred to the possession of cocaine by Darryl Ewite Kelley, rather than heroin. Count Four alleged that on or about October 1, 1965, appellant, with intent to defraud the United States, knowingly received, concealed and facilitated the transportation and concealment of 1.7 grams of marihuana, which, as appellant knew, had been imported and brought into the United States contrary to law. Count Five charged that appellant knowingly and unlawfully acquired and obtained 1.7 grams of marihuana without having paid the transfer tax imposed by Section 4741(a), Title 26, United States Code.

On March 10, 1966, the appellant was arraigned before the Honorable Francis C. Whelan, United States District Court Judge. Appellant stood mute, and a plea of not guilty was entered to each count of the indictment [R. T. 14-15]. 2/ The case was set for trial

---

2/ "R. T." refers to Reporter's Transcript of Proceedings.

on March 21, 1966, at which time a defense motion for one week's continuance was granted [R. T. 22]. The case was called for jury trial on March 29, 1966, before the Honorable Francis C. Whelan, United States District Judge. Prior to trial, the defendant's motion to remove her counsel, filed in propria persona on March 28, 1966 [Supplemental Designation of Record], was heard and denied [R. T. 34]. In addition, a motion to dismiss the indictment, filed in propria persona [C. T. 10], was denied [R. T. 35] and a motion to suppress evidence [C. T. 25] was denied after the taking of testimony [R. T. 50].

At the conclusion of the government's case, the defendant's motion for judgment of acquittal on Counts One, Four and Five of the Indictment was denied [R. T. 295, 300, 302], and the government's motion to dismiss Counts Two and Three was granted [R. T. 298]. After the defense rested, the motion for judgment of acquittal was renewed and denied as to Counts One and Four, but taken under advisement as to Count Five [R. T. 406-07].

On April 5, 1966, the jury returned a verdict finding the appellant guilty as charged in Counts One, Four and Five [R. T. 503].

On May 3, 1966, Judge Whelan granted the motion for judgment of acquittal on Count Five, and sentenced appellant to imprisonment for a term of seven and one-half years on each of Counts One and Four, the sentences to run concurrently [C. T. 105; R. T. 517]. An oral motion for new trial on the ground of insufficiency of the evidence to support the verdict was denied [R. T. 514-15].

A timely notice of appeal was filed by the appellant, in propria persona [C. T. 106].

The United States District Court for the Southern District of California had jurisdiction of this case pursuant to Title 18, United States Code, Section 3231. Jurisdiction of this Court to entertain the appeal is derived from Title 28, United States Code, Sections 1291 and 1294.

II

SPECIFICATION OF ERRORS

The following three issues are raised in the argument presented in Appellant's Opening Brief:

A. Did the trial court commit prejudicial error by admitting into evidence tape recordings of conversations between the appellant and a separately indicted co-conspirator?

B. Was plain error committed by the admission into evidence, without objection, of conversations between the appellant and Customs Agents after her arrest?

C. Was the trial court's denial of a motion, filed by the appellant one day before the trial, to remove her retained counsel, an abuse of discretion?

III

STATEMENT OF FACTS

In June, 1965, Darryl Ewite Kelley was introduced to the appellant, Erma Jean Good, by his roommate [R. T. 97]. In the succeeding months, he was called by the appellant, and agreed to rent automobiles for her use on two occasions [R. T. 105, 106]. In early August, 1965, Mr. Kelley called the appellant at a telephone number in Oakland, California supplied by her, and was asked by her to "make a run to Los Angeles, and pick up a package for her" [R. T. 108]. On August 3, 1965, he met the appellant at the Sportsman Club in Oakland, where she paid him $150 to go to Los Angeles and pick up a package. Mr. Kelley supplied the appellant with the number of a friend's telephone where he could be reached in Los Angeles [R. T. 109-10]. That evening, he flew to Los Angeles, and took a cab to the home of his friend. At approximately 10:00 P. M. he received a telephone call from the appellant, who instructed him to go to Rosie's Cafe at 65th and Figueroa in Los Angeles, where he would see a man dressed in "black card, blue jacket, T-shirt". He was told to tell this man that Jean sent him, pick up a package, and call the appellant [R. T. 111-13]. Darryl Kelley went to Rosie's Cafe, and after waiting, saw a person meeting the description given him by appellant enter the cafe. After identifying himself, Mr. Kelley and this person left the cafe, entered Kelley's car and drove several blocks, then returned to the vicinity of Rosie's Cafe. They then got

into the other man's car, and Mr. Kelley was given a rolled-up plastic package [R. T. 115-16]. He placed the package in his pocket and got out of the car [R. T. 116-17]. At this time, he was placed under arrest by Customs Agents [R. T. 117]. The package was removed from his pocket by the agents [R. T. 285] and subsequent chemical analysis revealed that it consisted of two tubes containing 48. 2 grams of cocaine hydrochloride, as well as 3 tubes containing 76. 5 grams of heroin hydrochloride, all contained in a plastic bowl cover [R. T. 231-36, Plaintiff's Exhibit #3].

Mr. Kelley was taken to the Custom's Office, where he conversed with the arresting agents. After he was given an opportunity to consult privately with his attorney, he consented to the placing of a telephone call to the appellant, and to having this call tape-recorded by the agents [R. T. 120-22]. After calling twice and not reaching the appellant, Mr. Kelley left a message that he could be reached at the number of the Custom's Office. Shortly thereafter, at 11:28 a. m. on August 4, 1965, he received a call at this number from the appellant [R. T. 122-24]. This conversation was recorded by means of an induction coil attached to the ear-piece of the telephone [R. T. 126]. The recording was admitted into evidence as Plaintiff's Exhibit #5, and played to the jury [R. T. 133]. In this conversation, Mr. Kelley told the appellant that he threw the package in the bushes and recovered it after he had been arrested. The appellant told him to rent a car, drive back to San Francisco, and call her [Plaintiff's Exhibit #5, See Appellee's Motion to Augment Record on Appeal].

Darryl Kelley returned to San Francisco, accompanied by a Customs Agent. Upon his arrival, on the morning of August 5, he again called the appellant several times, finally leaving a message that he could be reached at the number of the motel where he was staying. Shortly thereafter, he was called by the appellant, and the conversation was again recorded with his consent [R. T. 141-44]. The recording was admitted into evidence as Plaintiff's Exhibit #6, and played to the jury [R. T. 144]. During this conversation, appellant asked Mr. Kelley what kind of automobile he was in, and told him to take the package to 23rd and Van Ness, and give it to a "heavy set, dark fellow" in a blue Chrysler, then to "come over to the Sportsman so me and you can talk, here? And I can give you some money." [Plaintiff's Exhibit #6, See Appellee's Motion to Augment Record on Appeal].

Darryl Kelley then proceeded to the corner of 23rd and Van Ness Streets in San Francisco, and parked his automobile [R. T. 148-50]. The intersection was placed under surveillance by Customs Agents [R. T. 209, 221]. A 1958 blue Chrysler containing two male Negroes was observed slowly circling the block twice at approximately 11:00 A. M. [R. T. 210-11]. Shortly after 12:30 P. M., a grey or blue Corvair containing two male Negroes double parked beside Mr. Kelley's automobile [R. T. 150-51, 212-13, 222]. The man driving the Corvair got out, walked past Mr. Kelley's car, and asked if he had seen the police, to which he replied "no". The man then entered a near-by market, came out with a soft drink, and drove away [R. T. 152].

Nearly two months later, on October 1, 1965, the appellant was arrested on a federal warrant in the City of Compton by an officer of the Compton Police Department [R. T. 266-68]. At the time of her arrest, the appellant asked permission to use the restroom, which was denied [R. T. 269]. She was advised of her constitutional rights, then transported, unhandcuffed, in the right front passenger's seat of a police vehicle [R. T. 269-70]. On the way to the police station, she was readvised of her constitutional rights [R. T. 270]. Appellant told the transporting officer she had in her possession "three or four joints", and asked for his permission to get rid of them. When such permission was denied, she reached into her brassiere, withdrew three hand-rolled cigarettes, and tossed them out the window of the moving vehicle. The officer immediately stopped and retrieved the cigarettes [R. T. 271-72]. Subsequent chemical analysis revealed that the cigarettes contained 26 grains of marijuana seed tops [R. T. 238, Plaintiff's Exhibit #4].

Later that evening, the appellant was interviewed at the Compton Police Station by a Customs port investigator. At that time, she was advised "that she didn't have to make any statements at that time without an attorney being present, and that if she did make any statements that they could be used against her . . . in a court of law" [R. T. 281]. The appellant then admitted throwing the marijuana cigarettes from the police car window, and admitted her address and telephone number in Oakland, California [R. T. 281-82], the same number which she had given to Darryl Kelley [R. T. 108].

Testifying on her own behalf, the appellant described her relationship with Darryl Kelley as "close" [R. T. 318], and stated that he had supplied her with narcotics on at least one prior occasion [R. T. 321]. She admitted the conversations contained in Plaintiff's Exhibits #5 and #6, explaining that she expected to pay Mr. Kelley $200 for a "piece" (one ounce) of heroin [R. T. 328-30]. She also admitted possession of the marijuana charged in Count Four of the indictment, explaining that she had found it growing wild while on a fishing expedition in the San Joaquin Valley [R. T. 331].

IV

SUMMARY OF ARGUMENT

A. Tape recordings of conversations between appellant and Darryl Kelley were properly admitted into evidence as admissions against interest. Interception and divulgence were voluntarily consented to by Mr. Kelley.

B. Conversations between appellant and Customs Agents were admissible, as all necessary warnings were complied with. Even if they were not, failure to object at trial precludes raising the issue on appeal.

C. The trial court's denial of appellant's motion, filed one day before trial, to remove her retained counsel, was not an abuse of discretion.

V

ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE TAPE RECORDINGS OF CONVERSATIONS BETWEEN THE APPELLANT AND A SEPARATELY INDICTED CO-CONSPIRATOR.

Appellant attacks the admission into evidence of the recorded telephone conversations between herself and Darryl Kelley on two grounds: that the conversations occurred after the conspiracy ended, and hence were inadmissible to prove the conspiracy; and that the consent given by Mr. Kelley to interception and divulgence of the conversations was not voluntary.

The first ground advanced by the appellant misconstrues the evidentiary rule allowing the admission of the statements of a co-conspirator. Simply stated, this rule "permits out of court statements of one conspirator to be used against another". Krulewitch v. United States, 336 U. S. 440, 443 (1949). The doctrine is merely one of the many exceptions to the hearsay rule. On a theory of agency, the acts and statements of one co-conspirator are attributed to all members of the conspiracy, hence admissible as evidence against all. See 72 Harv. L. Rev. 920, 984 (1959). Where the statements of a member of a conspiracy are admissions, however, they are admissible as evidence against the conspirator who made the statement without recourse to the "co-conspirator doctrine". Such is the case here.

The government will concede that, at the time these conversations occurred, the conspiracy between Erma Jean Good and Darryl Kelley had ended. This fact would preclude the use of out of court statements made by Mr. Kelley as evidence against the appellant. Such was the holding of both Krulewitch, supra, and Delli Paoli v. United States, 352 U.S. 232 (1956), relied upon by appellant. Both of these cases concerned the admissibility of a co-conspirator's statement made out of the presence of the appellant long after the conspiracy had ended. But here we are concerned with statements made by the appellant herself. The distinction was clearly spelled out by this Court in Murray v. United States, 250 F. 2d 489, 491 (9th Cir. 1957), cert. den. 357 U.S. 932 (1958), in which the government had offered recordings of testimony recorded subsequently to the termination of a conspiracy to smuggle birds into the United States:

> "These were admissible (just as other alleged statements of the defendants were admissible) as admissions against interest; admissible and offered only against the person making the admission, and not as statements of one conspirator, admissible against a co-conspirator, made during the course of the conspiracy."

The appellant suggests that the jury should have been instructed that the conversation would be limited as an admission of the defendant, although no such instruction was requested in the

Court below. Even if it were, such an instruction would be unwarranted and unnecessary. The "co-conspirator" was testifying as a witness in open court, and the recorded conversations were part and parcel of his testimony. See McClure v. United States, 332 F. 2d 19, 22 (9th Cir. 1964), cert. den. 380 U. S. 945 (1965). Moreover, the statements made by Mr. Kelley in the course of the conversation were, of course, in the presence of the appellant, hence admissible against her even if not in the course of the conspiracy. Sparf v. United States, 156 U. S. 51, 56 (1895).

Appellant further asserts that, even if considered an admission against interest, the statements of the appellant in the course of the recorded conversation were inadmissible because the warnings required by Miranda v. Arizona, 384 U. S. 436 (1966) and Escobedo v. Illinois, 378 U. S. 478 (1964) were not given. Since this issue was not raised below, it is not cognizable on appeal for the same reasons stated in response to appellant's second specification of error, infra. Even if it were, a warning would not be required under either the Miranda or Escobedo decisions. As stated in Miranda, 384 U. S. 436, 477:

> "The principles announced today deal with the protection which must be given to the privilege of self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way."

Similarly, the Escobedo ruling involved a situation where:

> "The existence of the crime was apparent.

The police were seeking to identify the offender. The accused had been taken into custody." Kohatsu v. United States, 351 F. 2d 898, 901 (9th Cir. 1965), cert. den. 384 U. S. 1011 (1966). Accord: Irwin v. United States, 338 F. 2d 770, 777 (9th Cir. 1964).

The statements in question here were made nearly two months prior to the time appellant was taken into custody.

Turning to the second ground advanced by the appellant, that the consent given by Mr. Kelley to interception and divulgence of the conversations was not voluntary, as once stated by this Court, "this is a small horse soon curried". Wilson v. United States, 316 F. 2d 212, 213 (9th Cir. 1963), cert. den. 377 U. S. 960 (1964). The record reflects that Mr. Kelley was given an opportunity to consult with his attorney before he agreed to the interception and divulgence. The only showing of "coercion" to meet the appellant's burden is the assertion that "it would be naive to believe that he did not give his consent because of expected leniency" [Appellant's Opening Brief, p. 20]. Such a contention has twice been rejected by this Court. Black v. United States, 341 F. 2d 583 (9th Cir. 1965); McClure v. United States, 332 U. S. 19 (9th Cir. 1964), cert. den. 380 U. S. 945 (1965).

The cases cited by appellant in support of this contention are readily distinguishable. In Weiss v. United States, 308 U. S. 321 (1939), consent to divulgence of the telephone conversations was not obtained until after the calls had been intercepted, and the participants were ignorant of the interception at the time it occurred.

Cf. Campbell v. United States, 337 F. 2d 396 (7th Cir. 1964), cert. den. 379 U. S. 983 (1965). Similarly, United States v. Laughlin, 222 F. Supp. 264 (1963) rested upon an express finding by the District Court that consent was induced by an implied threat of being indicted if the party did not cooperate. 222 F. Supp. at 268.

B. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY ADMITTING INTO EVIDENCE, WITHOUT OBJECTION, CONVERSATIONS BETWEEN THE APPELLANT AND CUSTOM'S AGENTS AFTER HER ARREST.

The trial of the appellant occurred after the ruling of the Supreme Court in Escobedo v. Illinois, 378 U. S. 473 (1964), but prior to the decision in Miranda v. Arizona, 384 U. S. 436 (1966). The Miranda ruling has no application to cases tried prior to June 13, 1966. Johnson v. New Jersey, 384 U. S. 719 (1966). Thus, only two issues are raised by the appellant's second specification of error: (1) Did the warning given to the appellant prior to her admissions after her arrest conform to the requirements of Escobedo v. Illinois? (2) If not, is the issue cognizable on appeal as plain error?

The only warning required by Escobedo is a warning of the right to remain silent. This is clear from the Court's distinguishing Crooker v. California, 357 U. S. 433, on the ground "that the petitioner there, but not here, was explicitly advised by the police of his constitutional right to remain silent and not to say anything

in response to the questions". 378 U.S. at 491-92. The requirement was clearly met in the present case, as appellant was advised "that she didn't have to make any statements at that time without an attorney being present, and that if she did make any statements that they could be used against her . . . in a court of law" [R. T. 281].

Even if this warning was insufficient, failure to object at trial effectively precludes raising the issue on appeal. In this respect, appellant's situation is identical to that presented to this Court in Toland v. United States, 365 F. 2d 304, 306 (9th Cir. 1966), where it was held "failure to make objection to evidence either before or at trial precludes consideration of objections thereto on appeal unless good cause for such failure is shown".

C. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION, FILED ONE DAY BEFORE TRIAL, TO REMOVE HER RETAINED COUNSEL, WAS NOT AN ABUSE OF DISCRETION.

The granting of motions for continuance before or during trial rests within the sound discretion of the trial judge, and his action must be sustained in the absence of a clear abuse of discretion. Johnson v. United States, 291 F. 2d 150, 153 (8th Cir.), cert. den. 368 U.S. 880 (1961). When the motion of appellant to remove her retained counsel is placed in context, the soundness of the trial judge's exercise of discretion becomes readily apparent: the case had already been continued one week [R. T. 22], the

government had five witnesses from out of the City of Los Angeles who were standing by for trial [R. T. 28], appellant's attorney had been in the case for six weeks, and the motion was filed one day before the case was set to go to trial [R. T. 34]. The standard to be applied in considering such a request is not whether "any harm would have been done to the prosecution's case" [Appellant's Opening Brief, p. 21], but, rather, whether "adequate cause" was shown for such a request. United States v. Paccione, 224 F. 2d 801, 802 (2nd Cir.), cert. den. 350 U.S. 896 (1955). The trial judge held there was no showing that appellant's trial counsel was incompetent, nor is such a contention urged on appeal.

VI

CONCLUSION

There appearing from a review of the record no error prejudicial to the rights of appellant, the appellee respectfully prays that the judgment of conviction be affirmed.

Respectfully submitted,

JOHN K. VAN de KAMP,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

GERALD F. UELMEN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gerald F. Uelmen
GERALD F. UELMEN